PRACTICE—WILLS—CONCLUSIVENESS OF FOREIGN PROBATE—A statute in West Virginia[1] provides that the ancillary probate of foreign wills of personalty or realty (if it is shown in the latter case that the will conformed in execution, *etc.*, to the *lex rei sitae*) may be attacked within five years upon the following grounds: (1) that the authenticated copy was not a true copy of the will; (2) that the probate of such will has been set aside by the court admitting it to probate; (3) that such probate was inproperly made. In a recent case[2] the Supreme Court of West Virginia held that a state court of equity had no general jurisdiction, nor jurisdiction given by the above statute, to set aside a will of realty or personalty on the ground of fraud in the procurement thereof, such will having been duly probated in the state of the testator's domicile, and subsequently duly admitted to probate in West Virginia on the filing of a duly certified copy.

Even in the absence of such a statute it seems to be settled that as regards personalty a probate in the jurisdiction of the testator's domicile is conclusive in the jurisdiction where the property is situated.[3] In such cases, the courts seem to have considered as decisive the general principle that the succession to personalty is governed by the *lex domicilii*.

As regards realty, however, there is very considerable confusion in the decisions.[4] The conclusiveness of a foreign probate is a question of practice and not of substantive law, and a failure to observe this distinction renders it impossible, in most of the cases on the subject, accurately to define the limits of the decisions. The well established rule that real property is subject to the exclusive jurisdiction of the courts of its locus requires that a will, to be an effectual disposition of such property, must conform in all substantive respects to the law of such locus;[5] therefore, although a court might consider a foreign probate conclusive as to matters which it properly determines, yet it need give such probate no effect as regards real property unless it be shown that the will was executed as required by the *lex rei sitae*. In *Sneed* v. *Ewing*[6] the Supreme Court of Kentucky seems to have observed this distinction: "There is an essential difference between the probate and the effect of a will. And the probate in Indiana, being in the nature of a judgment *in rem*, can not operate conclusively on land which is in Kentucky. It cannot conclude more than the jurisdiction *in rem* gave the court power to decide. The consequence is, that if the probate had been conclusive as to property in Indiana, it could not conclude the rights of the parties as to the land in Ken-

[1] Code of 1906, Chap. 77, Sect. 25.

[2] Woofter, *et al.* v. Matz, *et al.*, 76 S. E. Rep. 131 (W Va., 1912).

[3] Goodman v. Winter, 64 Ala. 410 (1881); Willett's App., 50 Conn. 330 (1883); Knight v Wheeldon, 104 Ga. 309 (1899); Nelson v. Potter, 50 N. J. L. 324 (1889).

[4] The cases on this point are collected in a note to State *ex rel.* Ruef v. Distrcit Court, 6 L. R. A. (N. S.) 617 (1906).

[5] White v. Howard, 46 N. Y. 144 (1871); Brock v. Frank, 51 Ala. 85 (1874).

[6] 5 J. J. Marsh. 460 (Ky., 1831).

tucky. As to that land, the will was liable to be contested whenever offered as evidence of title, unless it had been recorded in Kentucky according to her laws; and whenever so recorded, the right to contest it in chancery resulted *ipso facto*."

Although in this case the will was held invalid as to lands in Kentucky on a question of substantive law, yet the court intimates that the probate would not be conclusive even as to the question of practice it decides. The cases, as stated above, are unsatisfactory on this exact point, but their general trend, as it may be gathered, seems to be in the same direction. A foreign probate, because of the lack of jurisdiction, is not entitled to "full faith and credit" in the state where the realty is located.[7] The argument on the other side is predicated on the nature of a probate decree. That is, the statement that the governing law of wills of real property is the *lex rei sitae* properly refers only to requirements of substantive law and not to matters of practice. In this view a foreign decree of probate should be conclusive as to that which it purports to determine, *i. e.*, presence of testamentary capacity and absence of undue influence.

In most states today, there are statutes regulating the effect of foreign probate as regards both real and personal property. Such statutes may be, for general purposes, divided into two classes: those which abrogate the common law rule governing the disposition of real property, and those which simply provide that the ancillary probate shall be conclusive that such was in fact the testator's will. The latter class, of which the West Virginia statute quoted at the beginning of this note is an example, seems to constitute the majority. There are similar enactments in New York,[8] Rhode Island,[9] Georgia,[10] and Ohio.[11] Where there are such statutes it is still necessary that the will conform in execution and other substantive requirements to the *lex rei sitae*, whether there is express provision to such effect in the act or not.

Statutes of the former class are comparatively rare. The Maryland statute[12] provides that every will made outside of the state shall be valid in Maryland (1) "if made according to the forms required by the law of the place where the same was made," or (2) "by the law of the place where the testator was domiciled when the same was made," or (3) "according to the forms required by the law of this state." In a recent decision[13] under this act, it was held that an unattested holographic will made in accordance with the laws of a foreign country where the testator was residing would pass realty in Maryland, although such will was not in the form required by the law of the latter state. There are similar

[7] Robertson v. Pickrell, 109 U. S. 608 (1883).
[8] New York Code Civ. Proc., § 2703.
[9] Rhode Island Rev. Stat., Sect. 9, Chap. 155.
[10] Georgia Civil Code, § 3298.
[11] Act of May 3, 1852, § 52.
[12] Maryland, Code of 1904, § 327.
[13] Lindsay v. Wilson, 103 Md. 252 (1906).

statutes in Massachusetts[14] and Connecticut,[15] but the tendency of legislation and judicial interpretation seems to be in favor of the common law rule which requires conformity with the law of the situs.

S. A.

QUASI-CONTRACTS—WHAT CONSTITUTES UNJUST ENRICHMENT—The term "unjust enrichment" is frequently used by the courts and text writers in stating the basis of liability in quasi-contract actions. Owing, perhaps, to the great variety of the cases grouped under this general head, there is a certain amount of conflict and more or less confusion as to just what is meant by enrichment. Sometimes the word is used in a manner to indicate that an actual increase of the defendant's estate is requisite.[1] Undoubtedly in many cases such an increase is essential to a right of action. For instance, where improvements have been put upon land by a lessee, without the request of the lessor, the recovery, if any, can be only for the enhanced value of the land,[2] as that is the only benefit which the lessor can be said to have received.

Fabian v. *Wasatch Orchard Company*[3] is a case in the Supreme Court of Utah holding that the plaintiff may recover the reasonable value of his services, although the net result of his employment was a loss to the defendant. The Orchard Company hired Fabian to make a market for its canned asparagus. With the consent of the defendant a large quantity was sold, below the cost of production. Fabian, being unable to sue on the contract because it was unenforceable under the statute of frauds, brought a quasi-contract action. The Orchard Company defended that the action could not be maintained as no enrichment was shown, but the court took the view that Fabian should be allowed to recover the reasonable value of his services, and need not show that the Orchard Company had profited.[4]

While this is not a universal view,[5] it is submitted that it is a proper one, and represents the better considered cases. Since the defendant has received the services bargained for, it would be most unjust were the plaintiff denied a recovery of their value. It is true an action upon a constructive or quasi-contract is based upon the theory of restoring a benefit received by the defendant,

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[14] Massachusetts, Gen. Sts., Chap. 92, § 8; Slocomb v. Slocomb, 13 Allen 38 (Mass., 1866).

[15] Conn. Gen. Sts., Chap. 24, § 293; Irwin's App., 33 Conn. 140 (1865).

[1] Keener, "Quasi-Contracts," pp. 278, 279; Gillis v. Cobbe, 177 Mass. 584 (1901).

[2] Greer v. Vaughan, 96 Ark. 524 (1910); Adams v. Kells, 79 Kans. 564 (1909); Union Hall Ass'n v. Morrison, 39 Md. 281 (1873); Wendell v. Moulton, 26 N. H. 41 (1852).

[3] 125 Pac. Rep. 860 (Utah, 1912).

[4] Cozad v. Elam, 115 Mo. App. 136 (1905); Wojahn v. Bark, 144 Wis. 646 (1911); Werre v. N. W. Thresher Co., 131 N. W. Rep. 721 (S. D., 1911).

[5] Gillis v. Cobbe, *supra;* but note a strong dissent.